

Baumgartner (Migration) [2018] AATA 5408 (2 November 2018)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Mrs Andrea Manuela Baumgartner

CASE NUMBER: 1729924

DIBP REFERENCE(S): BCC2015/3334825

MEMBER: Grant Chapman

DATE: 2 November 2018

PLACE OF DECISION: Adelaide

DECISION: The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:

- cl.820.221(4) of Schedule 2 to the Regulations

Statement made on 02 November 2018 at 5:12pm

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner) – sponsorship limitation – five year limitation on Contributory Parent visa – compelling reasons to apply waiver provision – purpose of limitation – split visa application strategy – sudden stroke suffered by applicant’s father – remained in Germany to care for father and mother – travel rights of Contributory Parent visa – uncertainty regarding father’s health – decision under review remitted

1.

LEGISLATION

Migration Act 1958 (Cth), ss 5F, 65

Migration Regulations 1994 (Cth), rr 1.15A, 1.20KA; Schedule 2, cls 820.211; 820.221

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

2. This is an application for review of a decision of a delegate of the Minister for Immigration on 10 November 2017 to refuse to grant the applicant, Andrea Baumgartner, a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
3. The applicant applied for the visa on 12 November 2015 on the basis of her relationship with her sponsor, Franz Baumgartner. At that time, Class UK contained only one subclass: Subclass 820 (Partner (Temporary)). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
4. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.221(4) because her sponsor had obtained Permanent Residence in Australia on a Subclass 143 (Contributory Parent) visa on 30 May 2014. Subclause 820.221(4) requires that sponsorship must be approved and remain in force under Division 1.4 B to which the limitations under Regulation 1.20KA apply. Regulation 1.20KA prevents persons from sponsoring their partner or fiancé for a Partner or Prospective Marriage Visa for five years from the date the person was granted their permanent Contributory Parent visa, if they were granted their permanent Contributory Parent visa on or after 1 July 2009; and were in a spouse or de facto partner relationship with that person on or before the date their permanent Contributory Parent visa was granted. The delegate determined that this limitation applied to the applicant's sponsor and that he was not satisfied sufficiently compelling reasons existed to grant a sponsorship waiver applicable under Regulation 1.20 KA(3).
5. The applicant appeared before the Tribunal on 28 September 2018 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor. The Tribunal hearing was conducted with the assistance of an interpreter in the German and English languages.
6. The applicant was represented in relation to the review by her registered migration agent, Eunice You, from Winlaw Associates.
7. Following the Hearing, the applicant's agent provided several additional documents to the Tribunal, in response to questions asked of the applicant and sponsor by the Tribunal at the Hearing.
8. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

9. **Consideration of claims and evidence**

10. The issue in the present case is whether the applicant had compelling reasons for not applying for the Contributory Parent visa at the same time as her sponsor and therefore whether to apply the sponsor limitation waiver provision according to Regulation 1.20KA(3), thereby allowing the sponsorship to proceed.
11. In determining the applicant's claims, the Tribunal must first make findings of fact on material matters in dispute. This may involve an assessment of credibility and in so doing, the

Tribunal is aware of the need and importance of sensitivity to the circumstances and difficulties applicants may face before the Tribunal, related to their particular situation.

12. The applicant relies on written submissions and supporting evidence provided to the Tribunal and previously to the Department, together with oral evidence which the applicant and sponsor gave at the Hearing.

Whether the parties are in a spouse or de facto relationship

13. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian permanent resident.
14. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.

Are the parties validly married?

15. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. The parties provided evidence that they were married on 5 March 1981. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spousal relationship met?

16. In examining the documentary evidence tendered and the verbal evidence given by the applicant and sponsor at the Tribunal Hearing, the Tribunal has considered all the aspects of the relationship, as described in paragraph 12 above.

17. *Financial aspects of the relationship*

18. The parties provided evidence to establish the financial aspects of the relationship. This included evidence regarding joint ownership of assets, joint liabilities, the extent of pooling of financial resources, any legal obligations owed between the parties and any sharing of day-to-day household expenses.
19. Having examined this evidence, the Tribunal finds it to be adequate to establish the financial aspects of the relationship.
20. *Financial aspects conclusion:* The Tribunal places substantial weight on the cumulative evidence in support of the financial aspects of the relationship, including financial interdependence, as being one exhibiting a mutual commitment to a shared life to the exclusion of others, being a genuine and continuing relationship and that they are living together, or not separately or apart on a permanent basis.

21. *The nature of the household*

22. The parties provided evidence to establish the nature of the household, including any joint responsibility for care and support of children, the parties' living arrangements and any sharing of housework.
23. Having examined this evidence, the Tribunal finds it to be adequate to establish the nature of the household.
24. *Household aspects conclusion:* The Tribunal places substantial weight on the cumulative evidence presented regarding the nature of the household as being one which demonstrates the relationship between the applicant and sponsor as being a mutual commitment to a shared life the exclusion of others, being a genuine and continuing relationship and that they are living together, or not separately or apart on a permanent basis.

25. *The social aspects of the relationship*

26. The parties provided evidence to establish the social aspects of the relationship, including whether parties represent themselves to other people as being married to each other, the opinion of friends and acquaintances about the nature of the relationship and any basis on which the persons plan and undertake joint social activities.
27. Having examined this evidence, the Tribunal finds it to be adequate to establish the social aspects of the relationship.
28. *Social aspects conclusion:* The Tribunal places substantial weight on the cumulative evidence presented regarding the nature of the social aspects of the relationship between the applicant and sponsor as being one which exhibits a mutual commitment to a shared life to the exclusion of others, being a genuine and continuing relationship and that they are living together, or not separately or apart on a permanent basis.

29. *The nature of the persons' commitment to each other*

30. The parties provided evidence to establish the nature of the persons' commitment to each other, including the duration of the relationship, the length of time during which the persons have lived together, the degree of companionship and emotional support they draw from each other and whether they see the relationship as long-term.
31. Having examined this evidence, the Tribunal finds it to be adequate to establish the nature of the persons' commitment to each other.
32. *Commitment conclusion:* The Tribunal places substantial weight on the cumulative evidence presented regarding the nature of the persons' commitment to each other as being one where the relationship between the applicant and sponsor exhibits a mutual commitment to a shared life to the exclusion of others, being a genuine and continuing relationship and that they are living together, or not separately or apart on a permanent basis.

33. *Relationship Summary*

34. In summary, the Tribunal concludes that at the time of visa application and at the time of this decision, the applicant and sponsor have demonstrated financial interdependence. To the extent possible, given the circumstances discussed in the paragraphs below, they have been living together and sharing household duties. They present socially as a married couple and are accepted by family and friends as such. They have been in a committed relationship and married for more than 37 years. They provide companionship and emotional

support for each other and have demonstrated to the Tribunal continuing plans for their future together. The Tribunal finds that they were in a spouse relationship as defined by section 5F and is therefore satisfied that they met 820.211(2) at the time of application at the time of this decision.

35. *Any other relevant considerations - Compelling Reasons*

36. Therefore, the Tribunal finds that the only other relevant consideration and key issue to be resolved regarding the visa application is that described in paragraph 8 above, being whether the applicant had compelling reasons for not applying for the Contributory Parent visa at the same time as her sponsor and therefore, whether to apply the sponsor limitation waiver provision according to Regulation 1.20KA(3), thereby allowing the sponsorship to proceed.
37. The purpose of the Contributory Parent category of visa is to ensure that people migrating to Australia for the principal purpose of living near adult children and who are, therefore, of an age where they have retired from the workforce or are likely to retire from the workforce within a few years, make a substantial contribution, by way of the fee charged for this category of visa, to any costs, such as health and welfare, which may be borne by the Australian community as a result of the visa holders' Australian residency.
38. Prior to July 2009, a practice known as "split visa application" allowed a couple to make a substantial financial saving by one partner migrating under the Contributory Parent category and the other partner migrating later through the Partner visa category. Thereby, the couple using the split visa application strategy avoided paying the Visa Application Charge for the second applicant in the Contributory Parent category, which fee was substantially higher than for the standard Partner visa. Also, they avoided paying the higher Assurance of Support fee associated with a joint Contributory Parent Visa application. Hence, the purpose of sponsorship limitation under Regulation 1.20KA is to prevent the use of the split visa application strategy to abuse the Contributory Parent category visa provisions.
39. This is achieved by preventing a successful applicant for a Contributory Parent Permanent Resident visa, whose spouse did not apply for a Contributory Parent Visa at the same time as the successful applicant, from sponsoring the spouse for five years from the date the successful applicant was granted their Permanent Resident Contributory Parent visa.
40. However, the sponsorship can be approved if there are compelling reasons, other than the applicant's financial circumstances, for the visa applicant not applying for the Contributory Parent visa at the same time as the sponsor. The applicant claimed to have had compelling reasons for not applying for the specified visa, a claim rejected by Departmental delegate.
41. The applicant and her sponsor first migrated to Australia in 1981, arriving on 26 August 1981, having obtained Permanent Resident visas. Their two children, a son and a daughter, were born in Adelaide. However, in 1988, they returned to Germany because the applicant's father had dreamt of building a new hotel is an extension to the restaurant which he owned and operated in Freiberg and offered the applicant and her sponsor the opportunity of a business partnership to own and operate the hotel. Asked at the Tribunal Hearing why they had not taken out Australian citizenship while resident here, the applicant and sponsor responded that they were busy establishing themselves and looking after young children at the time, had not seen it as an urgent decision and that it had simply been overlooked.
42. In 2008, their son returned to Australia having completed an apprenticeship and worked in a bank in Germany and commenced a degree in finance as well as tutoring at the University of Adelaide. They developed concerns about their son, who graduated in 2010 but was involved in an emotional breakup with his partner. The applicant and sponsor decided that it

was time to return to live in Australia. During 2011 they made preparations to do so by selling the hotel management business and leasing out the hotel property.

43. Migration Agent, Peihong Sun, of 82 Franklin Street, Adelaide, South Australia, 5000, has provided a Statutory Declaration, dated 3 October 2018, that in early 2012 Franz Baumgartner met with him at Winters Solicitors in Adelaide to enquire about applying for a Subclass 143 Contributory Parent visa for him and his wife. Mr Sun advised that they would meet the criteria and gave them the relevant forms for completion and a document checklist to prepare the required documents. A few weeks later, Franz Baumgartner returned to the office with the completed forms and executed a fee retainer with Mr Sun. However, before Mr Sun commenced to process the application for lodgement, he received a telephone call from Mr Baumgartner requesting to put the application on hold as his wife had to return to Germany due to the sickness of her father. It was not until August 2012 that Mr Baumgartner met again with Mr Sun, informing him that his wife was unable to come to Australia because her father was very sick and she would have to remain in Germany to care for her father and mother but that he would continue alone with the visa application. Mr Sun cancelled the initial two-person retainer fee and executed a new retainer agreement with Mr Baumgartner on 31 August 2012. Mr Sun declares his view that both Mr and Mrs Baumgartner intended to come to Australia together via a Subclass 143 Contributory Parent visa application and had taken advice, as well as completing the required documents, for a joint application. This was truncated only as a result of Mrs Baumgartner having to remain in Germany to care for her parents, consequent on the circumstances of her father's health. The Tribunal accepts the veracity of Mr Sun's Declaration, together with his judgement which formed his view regarding the original intent of Mr and Mrs Baumgartner.
44. The applicant and sponsor provided to the Department and to the Tribunal substantial documented evidence regarding the sudden stroke suffered by the applicant's father just as the couple were in the initial stages of their visa application and the subsequent care needs of her father and mother, which only she, among all of her siblings, had both the time and qualifications, as a fully qualified caregiver, to provide. The applicant told the Tribunal Hearing that her initial visa application preparation had included undertaking a medical examination. However, she had been unable to find the documentation relating to this, to provide to the Tribunal.
45. In considering this appeal, the Tribunal has considered also the applicant's uncertainty, in light of her father's health, as to if and when she would be able to commit to permanent residence in Australia and weighed it against the delegate's conclusion that a Contributory Parent visa would have allowed periodic back and forth travel to Australia by the applicant for a period of five years, before losing such travel rights. The Tribunal finds that there was sufficient uncertainty regarding the applicant's father's potential lifespan, together with the care needs of her mother in the event of her father's death, to place substantial weight on a conclusion that the five year travel provision under a Contributory Parent visa was insufficient and this was a compelling reason for the applicant not to continue with that application in 2012.
46. The Tribunal accepts that the circumstances described by the applicant and her sponsor were sufficiently compelling reasons for the applicant not to apply for the Contributory Parent visa application at the same time as the sponsor.
47. *Overall conclusion*
48. On balance, given the evidence before it, the Tribunal is satisfied the visa applicant had compelling reasons for not applying for a contributory parent visa at the same time as their spouse, in accordance with Regulation 1.20KA(3).

49. The Tribunal has considered whether there are any other statutory limitations which would prevent approval of the visa sponsorship by the applicant sponsor. On the evidence before it, the Tribunal is satisfied that there is nothing to prevent the sponsorship from being approved.
50. Accordingly, the applicant meets cl. 820.221(4).
51. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

52. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:
 - cl.820.221(4) of Schedule 2 to the Regulations.

Grant Chapman
Senior Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).